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In the

Supreme Court of the United States

No. 79-1802

HEWITT P. TOMLIN, JR.; HOMER H. WALDROP; ROY HALL; and DAVID R. FARMER, Individually and As Partners Doing Business Under the Name and Style of Waldrop, Hall, Tomlin and Farmer, a Professional Business Association,

Petitioners,

v.

JOAN WOODRUFF; PATRICIA WOODRUFF HAMILTON; and LOUIS HAMILTON,

Respondents.

RESPONDENTS' BRIEF RE WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should a trial attorney be held responsible for damages sustained by his client due to an adverse judgment after trial if the client asserts the harm was caused by the exercise of professional judgment and selection of tactics followed by the attorney in the trial of the case?

2. Are rules of proximate cause any different in a professional negligence action involving an attorney than they are where the professional is a physician, architect or accountant?

3. In a diversity case is the United States Court of Appeals free to interpret and apply existing State Law where no State statute or categorical rule on the issue before it has been decided by the highest or intermediate appellate courts of that State?

4. In considering a Judgment N.O.V. for the defendant, must the Appellate Court consider the evidence and inferences therefrom in the strongest light favoring the plaintiff or can the Appellate Court, in a professional negligence case, choose to ignore expert testimony as to the applicable professional standard of care in favor of its own version thereof?

STATEMENT OF THE CASE

Joan Woodruff and Patricia Woodruff Hamilton sued Hewitt P. Tomlin and the members of his law firm in the United States District Court for the Western District of Tennessee. The Complaint alleged the professional negligence of the defendants caused a judgment adverse to plaintiffs in a personal injury action tried before a jury in August of 1971 in Chester County, Tennessee. After the jury in the District Court had been unable to agree the U.S. District judge entered Judgment N.O.V. against the Woodruff girls. On appeal the Sixth Circuit Court of Appeals reversed in a panel opinion entered February 22, 1979. (593 F.2d 33, Petitioners' Brief A13-A34) Rehearing *en banc* was granted by the Sixth Circuit Court of Appeals and opinion thereon was entered February 21, 1980. (Not yet reported but found

in Petitioners' Brief A35-A87) This *en banc* opinion also reversed the Judgment N.O.V. but eliminated three separate issues of negligence previously recognized as viable by the earlier panel opinion.

Petitioners request certiorari claiming that the Court of Appeals erroneously construed and applied State law. Petitioners assert that in Tennessee a lawyer who undertakes to present his client's case at trial can never be held legally responsible for ANYTHING HE DOES NO MATTER HOW PROFESSIONALLY EGREGIOUS IT MAY BE as long as the trial lawyer acts in good faith. They also claim that in Tennessee where the trial of a personal injury case is aborted or the case is lost because of the negligence of an attorney, the offended client may not recover damages because any causal connection between the attorney's negligence and the loss of the client's case could only be based upon SHEER SPECULATION and that no proof of proximate cause could possibly exist.

Respondents believe that the Sixth Circuit Court of Appeals correctly interpreted and applied Tennessee law in declaring that a lawyer who is negligent in preparation and trial of his client's case is legally responsible for the harm caused thereby; the amount of harm caused to the client by an attorney's negligence is a matter for the jury guided by the facts of the case and expert opinion testimony.

Respondents call this Court's attention to two obvious errors in the opinion issued by the majority of the Sixth Circuit Court of Appeals by *en banc* opinion issued February 21, 1980. These errors are:

1. The Court held that the law of the State of Tennessee on Last Clear Chance was "confused" in August of 1971

and therefore Tomlin's failure to object to an obviously erroneous Last Clear Chance instruction was not negligence.

2. The Court declared that since there was no evidence that standards of professional practice in Tennessee required Tomlin to consult a traffic reconstruction expert, his failure to do so was not negligence.

On the above two issues respondents respectfully suggest that this Court should adopt the concurring and dissenting opinion of Justice Weick. (Petitioners' Brief A61-A74)

Respondents believe that the majority of the *en banc* Court of Appeals erroneously failed to accept as true the expert testimony on applicable standards of professional practice offered by respondents in the trial court on these issues. Further, in August of 1970 Tennessee law on Last Clear Chance was clear, not confused. The rights of Tomlin's clients depended upon a correct jury instruction on this legal principle. The majority of the Circuit Court was clearly wrong when it excused Tomlin's failure to object to the erroneous instruction.

STATEMENT OF THE FACTS

This case of professional legal negligence was filed in the United States District Court for the Western District of Tennessee on January 14, 1974. Joan Woodruff and Patricia Woodruff Hamilton had been clients of Hewitt Tomlin and his law firm Waldrop, Tomlin and Hall of Jackson, Tennessee, in the period from 1968 to 1973. Mr. Tomlin had represented them as plaintiffs in an action to recover for personal injuries against Teague (the owner of a gravel truck), Pomeroy (the driver of the truck) and Nobles (the driver of the vehicle that had impeded traffic, triggering the events

that led to the ultimate collision). The accident had occurred in 1968 when Joan Woodruff was 15 and Patricia Woodruff Hamilton was 16 years of age. The Woodruff vehicle, driven by Patricia, had come over the top of a hill to find the road blocked by Nobles' vehicle 300 feet ahead of her, had applied the brakes in an emergency situation and skidded to a stop on the wrong side of the road with the Woodruff vehicle blocking a portion of the lane of travel used by opposing traffic. There was evidence (not presented by Tomlin at the trial) that the Woodruff vehicle was stopped in this position of peril for approximately 5.9 seconds while the heavily loaded truck was approaching up a grade. (The degree of this grade was not presented by Tomlin at the trial.) There was evidence available (not presented by Tomlin at the trial) that at 5 seconds before impact the truck, traveling at about 30 miles per hour, was 248 feet away with the ability to stop within 99 feet. There was evidence that the truck could have been stopped by the application of brake at several points without causing a collision (again, evidence not presented by Tomlin at the trial) and that the truck driver continued to accelerate his vehicle against the grade of the hill until very close to the point of impact. The case was tried twice, once in the summer of 1970, resulting in a hung jury, and again in 1971, resulting in a defense verdict and a verdict in favor of the defendants Teague and Pomeroy on a counterclaim filed against the Woodruff girls and their father.

Mr. Tomlin gave Mr. Woodruff clearly erroneous legal advice, did not interview three available, important witnesses whose names were given to him by Mr. Woodruff, did not present a map or plat of the scene of the accident, did not consult a traffic reconstruction expert, did not present two

applicable Tennessee statutes as the basis for liability and failed to object to a palpably erroneous instruction on Last Clear Chance.

Mr. Tomlin also represented conflicting interests in the matter. Further, in the professional negligence action in the District Court respondents made an offer of proof concerned with Mr. Tomlin's representation of conflicting interests. In the accident cases tried in 1970 and 1971 Mr. Tomlin had represented Charles Woodruff (father of the girls), Patricia Woodruff (the driver) and Joan Woodruff (the passenger). At the same time Mr. Tomlin was the recognized attorney for Tennessee Farmers Insurance Co., the carrier that had issued the liability policy on the Woodruff vehicle.

Some admissions by Mr. Tomlin about this conflict of interest issue are reported at page A20 of Petitioners' Brief (593 F.2d at 38)

Respondents' expert attorney witness in the District Court trial described the conflict of interest that existed between Tennessee Farmers Insurance Co. and Joan Woodruff and the conflict of interest that was present between the interests of Patricia Woodruff and Joan Woodruff. The thrust of this testimony was that a conflict of interest existed not only because Joan Woodruff had a possible right of action against Patricia and a possible right to recover on the liability policy issued by Tennessee Farmers, but also because there was a counterclaim and a claim of contributory negligence against Patricia by the defendants. The expert said that to represent both Patricia and Joan woudl cause an identification of interests to attach to Joan that would color her with any contributory negligence that could be proven against Patricia. He stated flatly that national standards of professional practice

demanded that Joan should have had independent representation and that the failure to supply her with this independent representation certainly affected the outcome of the trial as to Joan.

During his testimony this expert also pointed out the tactical advantage of having a separate lawyer represent Joan who could cross-examine witnesses presented on behalf of Patricia. The matter of the conflict of interest and liability imposed on Mr. Tomlin therefrom is very well discussed in the Circuit Court *en banc* opinion. (Petitioners' Brief A55-A57) The Court concluded this discussion by saying:

> "The district court does not appear to have held that there was no conflict in the multiple representation. Rather, it dismissed this claim on a finding that it would be speculation for a jury to find that Tomlin's multiple representation affected the outcome of the trial. 423 F. Supp. at 1289. We think the harm to Joan may be more than a different outcome of the trial of the action against Pomeroy, Teague and Nobles. She may have lost the opportunity for a recovery based on the negligence of Patricia, remote as that possibility may appear."

The facts of the collision and the facts relating to the case based on professional negligence against Mr. Tomlin are well summarized in both the previous opinions by the Sixth Circuit Court but are probably best found in 593 F.2d at 35-38. (Petitioners' Brief A14-A19)

Considering the patently erroneous instruction on Last Clear Chance the panel decision of the Court of Appeals, 593 F.2d at 41 (Petitioners' Brief A26-A28), specifically set out the instruction given by the State trial judge without objection by Tomlin. After quoting the instruction the opinion said:

> "This instruction was clearly erroneous. Under the doctrine of last clear chance the plaintiff's contributory negligence had ceased. It was no longer a proximate cause. The defendant saw the plaintiff in a position of peril in sufficient time that he could have averted the collision had he exercised ordinary care.
>
> "The instruction of the trial court defeated the entire purpose of the doctrine. It conflicted with a decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa*, 194 Tenn. 449, 251 S.W.2d 304 (1952). It also conflicted with our decision applying Tennessee law in *Smith v. Beattie*, 346 F.2d 139 (6th Cir. 1965)."
> (See also Concurring and dissenting opinion of Justice Weick, Petitioners' Brief A69-A71)

The erroneous instruction had allowed the jury to find for the plaintiff on the basis of Last Clear Chance "PROVIDED THEY ARE NOT GUILTY OF CONTRIBUTORY NEGLIGENCE THAT PROXIMATELY CAUSED THE ACCIDENT".

In the 1979 panel opinion the Sixth Circuit Court of Appeals found that allowing this instruction to go unchallenged, not raising it as a matter for a new trial or on appeal was negligence. The testimony of the attorney expert witness at the time of the trial before Judge Bailey Brown declared that it was absolutely negligence for any lawyer, anywhere, to permit this instruction to go unchallenged.

In the February 21, 1980, opinion the *en banc* court ignored the opinion of the expert witness and decided that Tennessee law on the subject was in confusion at the time and therefore it was not negligence for Tomlin to fail to object to the instruction.

Respondents believe that this was clearly error on the part of the Circuit Court.

ARGUMENT

1. SHOULD A TRIAL ATTORNEY BE HELD RESPONSIBLE FOR DAMAGES SUSTAINED BY HIS CLIENT DUE TO AN ADVERSE JUDGMENT AFTER TRIAL IF THE CLIENT ASSERTS THE HARM WAS CAUSED BY THE EXERCISE OF PROFESSIONAL JUDGMENT AND SELECTION OF TACTICS FOLLOWED BY THE ATTORNEY IN THE TRIAL OF THE CASE?

The answer to this issue is clearly "no". Petitioner is completely mistaken in asserting that the Sixth Circuit Court of Appeals held that an attorney may be liable for errors in professional judgment.

The Sixth Circuit Court of Appeals rendered two opinions in this case: *Woodruff v. Tomlin*, 593 F.2d 33, filed February 22, 1979 (Petitioners' Brief A13-A34) and on rehearing *en banc*, opinion not yet reported but filed February 21, 1980 (Petitioners' Brief A35-A87)

In the 1979 opinion the court said:

> "An attorney is not liable for mistakes in judgment or for tactical decisions, but he is liable for negligence that proximately causes injury to his client." (Petitioners' Brief A31; 593 F.2d at 43)

In the *en banc* opinion of February 21, 1980, the court said:

> "When viewed in light of the general Tennessee rule which holds attorneys liable for losses to clients for failure to exercise reasonable skill and care, *Stricklan* can only mean that there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment. This is a sound rule." (Petitioners' Brief A44)

Petitioner claims that when a lawyer in preparation for trial of a case fails to interview important witnesses he

should be excused because he is "exercising his professional judgment". This contention was properly disposed of by the Circuit Court panel opinion at pages 42-44 of 593 F.2d (Petitioners' Brief A30-A33) and the *en banc* opinion. (Petitioners' Brief A43-A45)

The failure to urge liability during the trial based on specific Tennessee statutes is obviously not a matter of professional judgment. *En banc* opinion. (Petitioners' Brief A54-A55)

When an attorney represents conflicting interest in the trial of a case without advising either client of such conflict, he is certainly negligent. Panel opinion 593 F.2d at 38-41 (Petitioners' Brief A19-A26) and *en banc* opinion. (Petitioners' Brief A55-A57)

2. ARE RULES OF PROXIMATE CAUSE ANY DIFFERENT IN A PROFESSIONAL NEGLIGENCE ACTION INVOLVING AN ATTORNEY THAN THEY ARE WHERE THE PROFESSIONAL IS A PHYSICIAN, ARCHITECT OR ACCOUNTANT?

This issue is completely discussed and disposed of by the panel opinion at page 44 of 593 F.2d (Petitioners' Brief A33) and by the *en banc* opinion of the majority at page A58 of Petitioners' Brief.

Additionally, the Restatement (Second) of Torts, states a special proximate cause rule applicable to the relationship between a client and a professional who undertakes to render services for the client. Section 323 of the Restatement (Second) of Torts, says:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for

physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking."

This rule has been applied in medical malpractice cases. *Hamil v. Bashline*, 392 A.2d 1280 (Pa. 1978); *Hicks v. United States*, 368 F.2d 626 (4th Cir. 1966); *Voegelis v. Lewis*, 568 F.2d 89 (8th Cir. 1977); *Daniels v. Hadley Memorial Hospital*, 185 U.S. App. D.C. 84, 566 F.2d 749 (1977); *McBride v. United States*, 462 F.2d 72 (9th Cir. 1972).

3. IN A DIVERSITY CASE IS THE UNITED STATES COURT OF APPEALS FREE TO INTERPRET AND APPLY EXISTING STATE LAW WHERE NO STATE STATUTE OR CATEGORICAL RULE ON THE ISSUE BEFORE IT HAS BEEN DECIDED BY THE HIGHEST OR INTERMEDIATE APPELLATE COURTS OF THAT STATE?

The answer to this issue is obviously "yes".

The matter is carefully and thoroughly discussed in the *en banc* opinion of the Sixth Circuit Court of Appeals at pages A40-A45 of Petitioners' Brief.

Petitioner relies on *Stricklan v. Koella*, 546 S.W.2d 810 (Tenn. App. 1976), to support his contention that in Tennessee a trial lawyer can never be liable to his client for negligent professional conduct if that conduct occurs in the preparation for trial or trial of litigation. The opinion in *Stricklan* was rendered by Judge Charles Nearn on September 20, 1976. Judge Nearn gave testimony by deposition (taken June 17, 1976) as an expert witness on behalf of Mr. Tomlin at the professional negligence trial before the U.S. District Court. The opinion in *Stricklan v. Koella* was issued after

the mistrial in *Woodruff v. Tomlin* and while petitioners' Motion for Judgment N.O.V. was pending. The rule in *Stricklan* is clear. It is contained in the following words:

> "Essentially and in simple terms, the cause of action stated is that retained counsel refused to use the trial tactics insisted upon by the client, for which refusal retained counsel's services were terminated; that the refusal of counsel to try or prepare the case in the manner insisted upon by the client (by filing of depositions) caused the client to be without representation on the day of trial and forced the client into an expensive settlement without a trial of his case. . . We hold that there can be no such cause of action in this state." 546 S.W.2d at 812.
>
> . . . .
>
> "We do not hold that there generally is no cause of action against an attorney for his negligence or malpractice; we only hold that for the reason given, there can be no cause of action against an attorney arising out of the manner in which he honestly chooses to present his client's case to the trier of the facts." 546 S.W.2d at 814.

Clearly *Stricklan* only announces the well-established rule that a professional who makes a choice between two or more methods of performing his function is not liable for harm to the client because he exercised his professional judgment and chose the wrong method where each method available was within accepted standards of professional practice.

The fact that Judge Nearn, in *Stricklan*, cited and reviewed the English rule recognizing immunity to barristers has little significance. The references appear to be clearly obiter dicta.

There is no immunity from liability for negligent performance by an attorney in a trial before a United States District Court. This is a principle declared by this Court in

the case of *Ferri v. Ackerman*, ___ U.S. ___, 62 L. Ed. 2d 355, 100 S. Ct. 402 (1979). The same principle obviously applies to an attorney undertaking to represent his client in State court litigation.

4. IN CONSIDERING A JUDGMENT N.O.V. FOR THE DEFENDANT, MUST THE APPELLATE COURT CONSIDER THE EVIDENCE AND INFERENCES THEREFROM IN THE STRONGEST LIGHT FAVORING THE PLAINTIFF OR CAN THE APPELLATE COURT, IN A PROFESSIONAL NEGLIGENCE CASE, CHOOSE TO IGNORE EXPERT TESTIMONY AS TO THE APPLICABLE PROFESSIONAL STANDARD OF CARE IN FAVOR OF ITS OWN VERSION THEREOF?

Respondents urge that the Court of Appeals erroneously ignored positive expert testimony that applicable standards of legal professional practice required defendant Tomlin to:

1. Object to the obviously erroneous instruction on Last Clear Chance and raise the issue on a Motion for a New Trial and on an appeal;

2. Consult a traffic reconstruction expert in preparation for trial of the accident case.

Considering No. 2 above the *en banc* court said:

> "There was no evidence that the accepted standard of performance for Tennessee lawyers requires consultation with a traffic reconstruction expert, or use of such a witness, in highway accident cases."

This statement is categorically incorrect. Mr. John H. Westover appeared before the District Court as a legal expert witness presented by respondents. He stated that he was a member of a large law firm in Phoenix, Arizona, that represented and defended cases for many national insurance carriers. He had specialized in the trial of traffic accident cases

for over 20 years. He had attended national seminars on the subject, communicated with other attorneys from all over the United States and was familiar with national literature on the subject. He said that for those who specialize in this type of trial work there was a NATIONAL STANDARD OF PRACTICE. On the basis of his qualifications, Mr. Westover's testimony as to the standards of practice Mr. Tomlin was required to follow was received by the trial judge without objection by petitioners.

Mr. Tomlin was the attorney regularly employed by Tennessee Farmers Insurance Co. to defend cases in Jackson (Madison County), Tennessee, and adjacent counties. He also represented many other liability insurance carriers and specialized in traffic accident cases.

Mr. Westover testified that on the facts of the case of *Woodruff v. Pomeroy, et al.* as shown by the transcript of testimony, the applicable standard of practice required Mr. Tomlin to have consulted a traffic reconstruction expert. (See Appendix A attached hereto) A basic principle of appellate procedure requires the Appellate Court in considering a Judgment N.O.V. granted in favor of the defendant to accept as true all evidence supporting the plaintiff, together with all reasonable inferences therefrom.

In its *en banc* opinion the Circuit Court said, at another point in its opinion, the following:

> "Our review of a judgment n.o.v. is governed by the same rule which applies to an appeal from a directed verdict granted at the close of all the evidence. We are required to 'view the evidence, as well as all inferences properly deducible therefrom, in the light most favorable to the plaintiff. *Campbell v. Oliva*, 424 F.2d 1244, 1245 (6th Cir. 1970). A judgment n.o.v. should not be granted 'unless the evidence is

such that there can be but one reasonable conclusion as to the proper verdict.' *Reeves v. Power Tools, Inc.*, 474 F.2d 375, 380 (6th Cir. 1973)."

On this issue the Court of Appeals *en banc* erroneously decided an issue of fact by declaring as a matter of law that:

> "The decision to establish the physical facts of the case by use of an engineer's plat rather than the testimony of an expert appears to be one of trial tactics or judgment as to the most effective presentation of a client's case. Once the distances between objects were established the time/distance factors and stopping distances were simple mathematical computations."

This statement is factually and legally incorrect and erroneous in three ways:

1. At the trial in the District Court Mr. Tomlin did NOT present an engineer's plat or map of the scene of the accident.[1] An engineer had been engaged by Tomlin and had indeed drawn up a map of the scene of the accident, with appropriate measurements of distances and the gradiant of the hill thereon. This map was used in the 1970 trial. The map was not presented in evidence in the 1971 trial of the accident case. In fact, when defense counsel in the accident case attempted to present this map in their case, Mr. Tomlin successfully objected.

2. The distances between objects was *never* established by Mr. Tomlin in the 1971 case. At the trial he presented evidence of the distance between the point of collision and the east end of the G.M. & O. Bridge as being "approximately" 525 feet through the testimony of Mr. Woodruff who

[1] In the District Court respondents contended that the failure of Tomlin to use a map, plat or aerial photograph was negligence.

had paced it off. (It was actually 548 feet.) The distance from the point of collision to the top of the hill over which the Woodruff car had come was estimated (without pacing or measurement) as 300 feet. (The fact that the point of impact was 20 feet higher than the bridge was not presented.)

3. It is simply not true that "time/distance factors and stopping distances were simple mathematical computations". The most important factor for the defendants Pomeroy. et al. was the speed at which the Woodruff car was traveling at the time its brakes were applied. Defendants claimed 252 feet of skid marks from this vehicle that were interpreted by their traffic expert Col. Dawson to mean that the Woodruff car was traveling in excess of 75 miles per hour. An opinion of this kind must necessarily be based on the coefficient of friction of the highway on which the skid marks appear. A highway develops a different coefficient of friction for an automobile traveling at low speed (30 miles per hour or under) than it does for one traveling at high speed. Mr. Lowell Hicks, traffic reconstruction expert presented by respondents in the District Court, testified that the coefficient of friction of the highway at the scene of the accident had been incorrectly assessed by Col. Dawson and that applying the correct coefficient of friction, the speed of the Woodruff vehicle was 65 miles per hour (within the speed limit). (See Appendix B attached hereto) Certainly these factors were *not* "simple mathematical computations" readily available to Mr. Tomlin or jurors without expert advice.

Clearly the Sixth Circuit Court of Appeals was in error when it stated:

"In the absence of bad faith, the failure to consult an expert cannot be the basis of liability."

Respondents urge that the dissenting opinion of Justice Weick on this point should be adopted. He said:

"I would, however, add to the majority opinion failure of Tomlin to call a reconstruction expert; failure to interview or take the deposition of Col. Dawson, a state police officer who was defendant's expert witness. In my opinion, Tomlin's excuse that it would be unethical is without legal support.

"In the malpractice trial, Tomlin called as expert witnesses two judges of the state trial courts, one state Court of Appeals judge, and two attorneys to help him out. A state judge had participated in the trials and the appellate judge had written the opinion for the Court of Appeals. Tomlin thus recognized the value of the expert testimony in defending himself and he should have used expert testimony for the benefit of his minor clients in the trials in the state court.

"It is obvious that the cases of the two girls were very poorly tried by Tomlin in the state court." (Petitioners' Brief A71-A72)

THE ERRONEOUS LAST CLEAR CHANCE INSTRUCTION

Concerning the obviously erroneous Last Clear Chance instruction which was given by the trial court in the accident case without objection by Tomlin, there was expert evidence by Mr. Westover that failure to object to this instruction violated applicable standards of professional practice.

In the panel opinion of 1979 the court said:

"It was error for the District Court to grant judgment n.o.v. as this vital issue of malpractice should have been submitted to the jury for determination, and could have produced a different verdict. Expert testimony on this issue and on proximate cause was offered by plaintiffs

in the malpractice trial." (Petitioners' Brief A27-A28, 593 F.2d at 41)

The *en banc* Circuit Court opinion ignored this testimony and determined AS A MATTER OF LAW;

> "In view of the confusion surrounding the proper application of last clear chance in Tennessee at the time of the Woodruff trial we can find no basis for holding that attorney Tomlin could be found negligent for failing to object to the instruction or for failing to urge it as error on appeal to the Western section of the Court of Appeals of Tennessee."

This statement is obvious error on the part of the Sixth Circuit Court of Appeals in its *en banc* opinion. Mr. Westover's expert testimony that the applicable standards of professional practice required Tomlin to object to this instruction, created an issue of fact. Mr. Westover's opinion was supported by the testimony of a judge who presided in Tennessee at the trial of the accident case. Honorable Andrew Taylor, circuit judge for the Western District of Tennessee appeared to testify as an expert witness on behalf of Tomlin before the U.S. District Court. Judge Taylor stated on cross-examination that if the facts supported a finding that the Woodruff girls had been stopped in a position of peril for 5.9 seconds while the Pomeroy truck approached from a distance of 248 feet, with the ability to stop short of a collision, the instruction he gave would be erroneous. Honorable Bailey Brown, district judge, recognized the issue and submitted it to the jury. Honorable Paul Weick, justice of the Sixth Circuit Court of Appeals, entered an opinion dissenting from the majority on this issue and said:

> "Tomlin, as an insurance lawyer engaged in the defense of personal injury cases must certainly be presumed to know the Tennessee law on the issue of last

clear chance, yet he made no objection to the erroneous instruction or request to the state trial judge to change the instruction to conform to Tennessee law. Nor did he assign the erroneous instruction on last clear chance as error in the motion for a new trial which he filed.

In our panel decision we stated:

> This instruction was clearly erroneous. Under the doctrine of last clear chance plaintiff's contributory negligence had ceased. It was no longer a proximate cause. The defendant saw the plaintiff in a position of peril in sufficient time that he could have averted the collision had he exercised ordinary care.
>
> The instruction of the trial court defeated the entire purpose of the doctrine. It conflicted with a decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa*, 194 Tenn. 449, 251 S.W.2d 304 (1952). It also conflicted with our decision applying Tennessee law in *Smith v. Beattie*, 346 F.2d 139 (6th Cir. 1965).
>
> It is argued that the erroneous instruction is supported by an appellate decision in *Smith v. Craig*, 484 S.W.2d 549 (Ct. App. Tenn., *cert. denied* August 7, 1972). The Supreme Court of Tennessee repudiated *Smith v. Craig, supra*, in *Street v. Calvert*, 541 S.W.2d 576 (1976).
>
> The trial judge, in giving the erroneous instruction, was bound by the decision of the Supreme Court of Tennessee in *Vaughn v. City of Alcoa, supra*, rather than by an erroneous decision of an inferior appellate court." (Petitioners' Brief A70-A71; 593 F.2d at 41)

In August of 1971 when the trial of *Woodruff v. Pomeroy* took place there was no confusion whatever in the rules of law in Tennessee applicable to the situation where the active contributory negligence of the plaintiff had ceased leaving her in an obvious position of peril. If the defendant then had the time and ability to avoid injury by exercising ordinary care he was liable. (*Vaughn v. City of Alcoa, supra; Smith v.*

Beattie, supra) On the other hand, if the contributory negligence of the plaintiff actively continued so that it was a factor in the injury she could not recover. The *en banc* opinion states this rule as follows:

> "Nevertheless, this instruction reflected the Tennessee rule then being followed that a plaintiff may not rely on last clear chance where his own negligence 'continues and is concurrent with the negligence of the defendant as a causal factor up to the time of the event which causes harm'. *Gardner's Masonry Contractors, Inc. v. St. Louis-San Francisco R. Co.*, 470 S.W.2d 945, 948-49." (Petitioners' Brief A47)

The Court of Appeals should have quoted more extensively from the case of *Gardner's Masonry Contractors, Inc. v. St. Louis-San Francisco R. Co.* The opinion in that case makes it crystal clear that the Tennessee law in May of 1971 was not "in confusion" on the application of the rule of Last Clear Chance. In that case the Court of Appeals of Tennessee stated:

> "Our Supreme Court in Vaughn v. City of Alcoa (1952) 194 Tenn. 449, 251 S.W.2d 304, stated the applicability of the doctrine to be as follows:
>
> > 'This doctrine is an arbitrary exception to the law barring recovery for contributory negligence of the plaintiff based upon the theory that the defendant is negligent in not extricating the plaintiff from his place of danger after it is discovered or should have been discovered, notwithstanding the fact that the plaintiff was guilty of contributory negligence in placing himself in danger.' " 470 S.W.2d at 948

The court further said:

> "It matters not whether the plaintiff is guilty of simple negligence or gross negligence, if that negligence is continuing to the event the doctrine cannot be applied as against the defendant. On the other hand we

> hold it matters not whether the plaintiff's negligence be gross or simple, if that negligence is spent, and does not continue as a causal factor, the doctrine of last clear chance may be asserted against the defendant if it is otherwise applicable.
>
> . . . .
>
> "The negligence of the plaintiff's employee Richardson, whether simple or gross, was spent when he parked the Skytrak, elevated the hoist and extended the boom over to the scaffold on the south wall of the building. Under the circumstances it was impossible for him to remove the Skytrak from the path of defendants' moving switch engine even though the proof establishes he tried to do so." 470 S.W.2d at 949

In *Woodruff v. Pomeroy* Joan Woodruff had testified that Woodruff vehicle skidded to a stop and remained there for an appreciable period of time, long enough for Patricia to press the starter switch several times. From Pomeroy's testimony came the clear inference that he was over 300 feet away from impact when the Chrysler skidded into his lane of travel. Skid marks in his lane of travel were shown to be less than 70 feet in length. Clearly there was evidence to support the conclusion that the Woodruff car was *stopped* in a position of peril, obvious to Pomeroy, and that he could have avoided the collision by exercising ordinary care. In August of 1971 it was the professional duty of Tomlin to know of the case of *Gardner's Masonry Contractors, Inc. v. St. Louis-San Francisco R. Co.*,[2] *supra*, and of the

[2]The opinion in *Gardner's* was issued by the Western Section of the Court of Appeals of Tennessee on May 25, 1971, 3 months before the second trial of *Woodruff v. Pomeroy*. In *Gardner's* an employee of the plaintiff had negligently driven a large lifting boom on the tracks of the defendant railroad and was engaged in lifting a load onto a nearby structure while defendant's switch engine was stopped a relatively short distance away. Without looking to make sure the way was clear, the engineer of the train moved the engine into collision with plaintiff's machine. The court held that the trial judge had correctly submitted the issue of Last Clear Chance to the jury and affirmed judgment for the plaintiff thereon.

Tennessee Supreme Court rules relied on therein.

Tomlin as a specialist in the trial of automobile accident cases for insurance carriers certainly could be presumed to know that any party to litigation is entitled to an instruction that correctly states the law applicable to the facts contended for by that party.

The Circuit Court erroneously and in violation of applicable principles of appellate procedure has denied respondents' cause of action based on the negligence of Tomlin that was one of the principal reasons for the adverse verdicts in *Woodruff v. Pomeroy*. This Court should grant certiorari and declare Tomlin's liability as a matter of law.

CONCLUSION

Respondents Joan Woodruff and Patricia Woodruff Hamilton received terrible and disabling injuries in 1968. Use of the judicial process to recover damages for these injuries was ineffectual because their Tennessee lawyer negligently prepared and presented their case. Their attempt to secure redress from this lawyer and his associates has been opposed by most of the Bar and Bench of Western Tennessee.

It should be remembered that at the time the issues in this case were presented at trial before the United States District Court in Jackson, Tennessee, petitioner Tomlin and his counsel presented five expert witnesses to testify that Tomlin performed in all respects in accord with accepted standards of legal practice. Of these five witnesses, two were judges of the Court of Appeals of Tennessee, one was a judge of the Circuit Court of that State and the other two were local attorneys. A review of the facts relating to Mr. Tomlin's representation of respondents as found in the record

and panel opinion (593 F.2d 33, Petitioners' Brief A13-A34) discloses that these opinions were either based on an unbelievably low standard of professional practice or were prompted by some sort of professional bias.

In the last seven years respondents have sought appellate redress four times from the Sixth Circuit Court of Appeals and spent nine days of litigation before the U.S. District Court for the Western District of Tennessee in a trial held at Jackson, Tennessee, the home town of the defendants. The final decision of the Sixth Circuit Court of Appeals *en banc* issued February 21, 1980, ordered a new trial but erroneously and unlawfully deprived them of at least two specific acts of negligence by petitioner Tomlin as the ground for their recovery against him.

Respondents do not believe that the courts of Tennessee have ever held that a trial lawyer is immune from liability for acts of negligence committed in the preparation and trial of litigation. On the other hand, respondents believe that this Court should grant certiorari, remedy the errors committed by the Sixth Circuit Court of Appeals *en banc* and grant judgment as a matter of law to respondents on appropriate issues of liability remanding the case for trial only on the issues of proximate cause and damages.

The representation of clients in litigation is an undertaking that requires a complete allegiance to the cause of the client, professional industry and diligence within recognized standards of learning and skill. A lawyer should not be able to carelessly abuse his client's confidence with impunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Respondents' Brief Re Writ of Certiorari have been served upon the following counsel of record on this the 9th day of June, 1980:

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APPENDIX

APPENDIX A

JOHN H. WESTOVER testified:
Tr. 1011-1014

. . . There are certain matters, however, that cannot vary and have to be the same for all the jurisdictions in the United States, and the reason for that is that under our system of practice we have basically what is called an adversary system. An attorney is hired for the purpose of representing and presenting the position of one side, that client. So he is hired to represent one person, and the attorneys on the other side are hired to represent the other people, and this system of the attorneys representing each side, two or more sides, then ultimately in the court room it is designed to elicit the truth for the jury. In addition to this, under the common law and up to the present time in every jurisdiction of the United States, an attorney is what is known as a fiduciary; that is, he is, in effect, a trustee to take and hold the interest and rights of his client just like a banker takes and holds the money that we deposit with the banker. But the obligation of the attorney is far more intricate and far more delicate as that of the banker.

THE COURT: You say the banker is a trustee?

THE WITNESS: Yes, Your Honor; fiduciary, Your Honor.

THE COURT: All right. Go ahead.

A. (Continuing) And so the attorney has an obligation in performing those services, for which he is a fiduciary and for which he is hired to bring to that diligence to it honesty in dealing with the client's rights, to bring to it an ability to

evaluate whether or not he is competent to handle or not handle those particular matters that are entrusted into his care, and impliedly he warrants, when he takes on a representation, that he is competent to handle those, and it is his obligation to turn it down if he is not. All right. Once one knows the system of accident litigation or injury litigation, that is, in the adversary system on the presentation of witnesses on either side, once one knows the technicalities of discovery and those kinds of things, and once one applies the obligations of an attorney as an adversary and as a fiduciary, then one knows there are certain things that everybody in that kind of system would do, or let's say everyone in that kind of system should do, and it is as to those things that I can testify, even though I know nothing about the lawyers who handle the matters for you folks out here in Tennessee.

Q. In that connection, Mr. Westover, in relation to the facts that you have gleaned about this case from reading the transcript and consulting the papers and instruments that you have seen, do you have an opinion as to whether or not Mr. Hewitt Tomlin and his lawfirm violated or did not come up to in their performance any of the accepted standards of practice which you regard as within your knowledge in relation to a lawsuit of this kind?

A. Yes, sir.

Q. And would you tell me, what is that opinion?

A. Do you want to go through all the conclusions that I have arrived at in answer to your request that I examine the matter?

Q. I think so. I think that is probably the easiest way to go about it.

A. All right.

Q. Would you prefer to do it some other way?

A. No. That's all right. I can answer. I am just trying to organize my thoughts.

Q. All right.

A. In my opinion, as an attorney for Joan Woodruff, he fell below acceptable standards in calling Gayle Sterling as a witness. I believe that the standards would have required him to call on behalf of both Gayle or Joan and Patsy Woodruff Mr. Burkhead as a witness. He clearly fell below the standards in failing to call to the court's attention the error which emasculated or, in effect, wiped out the last clear chance instruction, and then one other area, which kind of has multiple sub-heads, and that's this: That at some point, preferably early, he should have procured advice, at least, if not investigation from somebody capable of telling him about the reconstruction of accidents, and the recordation of those matters that needed to be recorded in order to reconstruct the accident, and looking toward the potential, I would say, calling a witness concerning the reconstruction of speeds of the vehicles, not saying that he necessarily would have—I am saying looking toward that potential and in that regard there is one other time, but it is not based upon the transcript—you have asked me to assume that there was an independent witness that could have testified independently that the length of the skid marks of the Woodruff vehicle were shorter, and based upon that assumption, there was an independent witness who paced them off, and then certainly standards required that he discuss the matter with that witness and determine what the witness' testimony was and make a decision as to whether or not to call the witness.—

Tr. 1019-1021

A. (Continued) All right.

The doctrine of last clear chance would obviously be relied upon by the attorney for Patsy, the driver. The doctrine of last clear chance implies in law to the concept of that element of liability known as proximate cause. Now, in order to impose liability upon a defendant in an accident case there must be three things that concur. There must be negligence on the part of the person who is the alleged wrongdoer. That negligence must be a proximate cause of the accident, and a third item, the injury sustained by the plaintiff who is seeking to recover damages. Now, proximate cause is a legal concept. It is a concept—the word "proximate," in fact, is simply an English word that means near or close. Okay. It's the word from which the word—from which other words are derived, like approximate, the opposite of that, or proximity, which means nearby. That derives from the same use. All right. Now, under the doctrine of last clear chance, the doctrine is that a person who is guilty of negligence still can recover, and his contributory negligence or his negligence after he is injured or that occurred before he was injured would not deprive him of recovering damages if it is not the the proximate cause of the accident, and it won't be considered under law to be the proximate cause of the accident in the following situation—if by virtue of the negligence of that injured person, that injured person has put himself in a peril, which the defendant recognizes and sees, and the defendant has a last clear chance to avoid the accident, then in legal contemplation the plaintiff's wrongful act or negligent act is not a proximate cause of his injures.

. . . .

A. (Continuing) Now, at the trial court level there was an

allegation of negligence on the part of the passenger, Joan, as well as the driver. So it was possible, I suppose, that the last clear chance doctrine could be applied to either one if the negligence of the passenger was going to be submitted to the jury as a means of preventing her recovery. Well, if one is going to advocate the doctrine of last clear chance in this kind of accident, one has to be able to show that the vehicle came to rest or at least started crossing the center line or that it was in a position of peril of some kind, of which the defendant Pomeroy was aware for sufficient period of time when Pomeroy had the last clear chance opportunity to avoid the accident; that being the position that the attorney on behalf of Joan or Patricia, or Patsy, wanted to advocate, and then it would be incumbent upon that attorney to be able to present evidence showing the time spans that took place, so as to be able to show that that time differential did occur during which Pomeroy had the last clear chance to avoid the accident. . . .—

Tr. 1024-1025

Q. And having read it, did you form an opinion as to whether or not it was an erroneous or correct instruction?

A. Yes.

Q. What was your opinion?

A. It was erroneous.

Q. Explain why, Mr. Westover?

A. All right. As I explained to you folks before, the concept of last clear chance is that it applies to proximate cause and it says, in effect, in its final result that the injured party's negligence is not a proximate cause of the accident in legal contemplation. I have forgotten exactly what the words

were of the judge. But the judge ended up, after giving the last clear chance instruction, saying you will apply this unless you find that the contributory negligence was the proximate cause. Well, it defeats—the way he presented it defeated the whole purpose of the doctrine, and there is no way that a lawyer or jury or anybody else could read the instruction the [sic] understand that last clear chance was for the purpose of cutting off the proximate cause between the negligence of the injured party and the accident.

Q. Well, when the judge does give what you believe to be an incorrect or erroneous instruction, what can you do about it, Mr. Westover?

A. Well, this is something that I think the particular procedure in Tennessee—the particular procedure in Tennessee is something I am not competent to testify on except to the extent that it appears in the transcript. In the transcript following the charge by the court when the attorneys were given an opportunity to request amendments or corrections, and I have forgotten the precise language that was used there, Your Honor, but the attorneys were given an opportunity, in effect, to state to the court, Your Honor, we respectfully submit that this particular statement of the law is incorrect and we would like for you to correct it—

THE COURT: In other words, object to it.

THE WITNESS: Yes, Your Honor.

THE COURT: All right. Go ahead.

A. (Continuing) And that simply was not done.—

APPENDIX B

LOWELL HICKS testified:

Tr. 436-439

Q. Well, now, do you have an opinion as to whether or not Colonel Dawson was correct when he testified in the trial of this case in 1974 from Chester County, as I have described it?

. . . .

THE WITNESS: I think he applied the coefficient of friction that he developed to a skid mark or length of skid that wasn't applicable. I think he conducted his test in all probability correctly and developed a correct coefficient for the speed that he did. But then to apply to a skid mark by a vehicle obviously going much faster than that, I feel that he erred.

BY MR. HERRING:

Q. Explain that, please?

First of all, what coefficient of friction from examining his testimony did you determine that he used?

A. I worked it out mathematically, and determined that it was a .76.

Q. Explain to the jury what is a .76 coefficient of friction, and what does it mean, and what does it mean in relation to a car that was supposedly moving over sixty miles na hour?

A. Well, .76 in my opinion—or I have never found a stretch of asphalt roadway that would produce a coefficient of .76 when you get up in the area of fifty miles an hour. I have never found one.

Q. Why is that?

A. The farther the car slides, the coefficient of friction is lowered, because of the heat generated between the tires and roadway, and the molten Bituminous products of the roadway, the tiers, after a while the vehicle begins to skid on a film, and it just takes farther to stop the faster we are going.

Q. During the course of Colonel Dawson's examination did you find anywhere in the record where anyone asked him how fast he was going when he made his coefficient of friction test?

A. No, I didn't.

Q. Did you look?

A. Yes, I did.

Q. Then you believe Colonel Dawson was completely erroneous in applying—

. . . .

BY MR. HERRING:

Q. Why did you conclude that Colonel Dawson was in error then? Explain to the jury totally again.

A. Because from looking at the skid marks on the roadway an officer can assume, as I teach, take a look at the skid marks left on the roadway as compared to what a vehicle would produce at the speed limit with an average coefficient of friction, and if you are going to run a test, if you are qualified to run a test, run it at something near the posted speed, and from this you will start developing a realistic coefficient of friction to be utilized if we then have something extremely higher than—a length of skid extremely higher than what we expect, and then we start running test skids at a higher rate of speed.

Q. Now, explain the difference between the coefficient of friction that you found, which you said was .56?

A. .56 if fifty-five miles an hour.

Q. How would that change the result of Colonel Dawson's testimony? He testified it was going seventy-six miles an hour with a coefficient of friction, you say, of .76. Why would it make a difference if you establish a coefficient of friction of .56?

A. You get an unrealistic resulting speed from using a higher coefficient of friction.

Q. Well, I guess we can get at it better this way: Assuming there were two hundred and fifty-two feet of skid marks out there at that time, and with your coefficient of friction that you established by your tests, do you have an opinion as to how fast the Woodruff car was traveling?

A. Yes.

Q. And what is that speed?

A. It would be sixty-five miles per hour.

Q. You mean the difference of the coefficient of friction between .56 and .76 makes that much difference?

A. Yes, sir.

Q. Was there some abracadabra or some peculiar thing that you do where you could determine this, or is this coefficient of friction the way you did it something that could be done by anybody who had sufficient training?

A. Anyone who had sufficient training.—